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IN THE

Supreme Court of the United States

Term, 1945. No. 367

JOHN MYERS,

Petitioner,

vs.

READING COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN H. HOFFMAN,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
510 North American Bldg.,
Philadelphia 7, Pa.,
Counsel for Petitioner.

Martin & Lyle, 404 Penfield Bldg., Phila., Pa.

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PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John Myers, by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on May 29, 1946.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 63 F. S. 817.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is not reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on May 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Sec. 347 (a).

QUESTION PRESENTED.

Did not the Circuit Court of Appeals (3rd Cir.) err in affirming action of District Judge in entering judgment n. o. v. for defendant railroad where the District Judge admitted that from all the evidence the jury might logically draw the inference that the brake was inefficient, but he decided against the plaintiff on the sole theory that the evidence might likewise support the inference that the brake was normal?

CONSTITUTION AND STATUTE INVOLVED.

The Seventh Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Safety Appliance Law, 45 U. S. C. A. Sec. 11, which, in part, provides:

> "* * * All cars must be equipped with secure sill steps and efficient hand brakes; * * *."

STATEMENT OF THE FACTS.

Plaintiff, a conductor in charge of a freight train shifting crew, directed a new employee to set freight car brakes before uncoupling the engine, following a shifting movement. Plaintiff later checked the brakes and discovered one that had not been tightened. After mounting the brake step of the platform, he began to tighten the brake by winding its wheel. He had his left arm through a lantern handle to light the scene, but he was able to use both hands in winding the wheel (21a). As he began winding the brake, he immediately noticed that it was extraordinarily stiff and sticky (21a).

Even before the plaintiff had totally wound the wheel, its

tension had become so great that it kicked violently. It had not acted like a normal brake, but had had an unusual spring and kicked "like a shoe",—as though "the slack were being run out". So severe was the plaintiff's reaction to this abnormal brake operation that the plaintiff instinctively raised the lantern hand from the wheel and signalled for a stop, believing that, perhaps, the cars were unauthorizedly moving under him.

The wheel had literally taken itself out of the plaintiff's hand, resulting in a palsy of the left hand which, for months thereafter, gave him great difficulty. He suffered a bad sacro-iliac back condition which medical authorities attributed to a twisting, wrenching move consonant with the violent jar of the brake (116a).

The jury, as a special finding of fact specifically found that the cars were not moved, but that the injuries suffered by the plaintiff were due to an inefficient brake within the meaning of the Statute. Therefore, a verdict of $5000. was given for the plaintiff.

The defendant, thereafter, filed a Motion for Judgment N. O. V. The Court granted the defendant's Motion for Judgment N. O. V. on the theory that, although, concededly, the evidence would sustain a jury finding of an inefficient brake, it might equally have sustained a finding of an efficient brake, and that, therefore, the plaintiff had not met his burden of proof.

The plaintiff appealed to the Circuit Court of Appeals for the Third Circuit, which affirmed, per curiam.

This Petition for Certiorari follows.

SPECIFICATIONS OF ERROR TO BE URGED.

1. In entering judgment for the respondent.

2. In failing to reverse the Trial Court's order granting judgment n. o. v. for the respondent.

REASONS FOR GRANTING OF WRIT.

1. Petitioner's Constitutional guarantee of trial by jury has been violated.

2. The decision of the United States Circuit Court of Appeals (3rd Cir.) is in direct conflict with the principle of the decision of this Court as expressed in LAVENDER v. KURN, 66 S. Ct. 740, decided Mar. 25, 1946.

3. LAVENDER v. KURN, supra, upheld the requirement of a jury trial in a case under the Federal Employers' Liability Act. The same principle should be reiterated as being likewise applicable to actions brought under the Safety Appliance Statutes.

CONCLUSION.

The writ should be granted.

Respectfully submitted,

JOHN MYERS,
By: JOHN H. HOFFMAN,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Counsel for Petitioner.

BRIEF.

ARGUMENT.

The jury answered the following interrogatories as indicated:

1. Was the brake in question an efficient brake? Answer: No.
2. If you find the brake in question was not an efficient brake, did that fact contribute to or cause any injuries to the plaintiff? Answer: Yes.

Evidence to support the jury's findings, that the brake in question was inefficient and that this inefficiency was the cause of the injuries, is found in such testimony as the following (pp. 20a and 177a):

"Q. And what were you doing?

A. I was tightening the brake—it was kind of stiff and sticking—it was pretty hard to signal with the one hand and to get the brake on.

Q. With the ordinary brake wheel, do you have the difficulty that you had with this wheel?

A. Not ordinarily.

Q. What was the difference between this wheel and the ordinary wheel?

A. It was kind of stiff, and like a spring,—like a shoe kicking back.

Q. And you started to try to set it?

A. That is right.

* * * * * * * *

Q. Go on, and tell His Honor and the members of the jury what took place while you were standing up there?

A. As I was tightening the brake,—just that quick,—I felt something like the slack being run out, getting ready to uncouple.

Q. What did you feel on your car?

A. A quick jar, and I took this hand to signal 'stop' (indicating).

Q. What did you signal?

A. I signaled 'stop' the best I could and hold on, but I went down; I lost my hold and down I went.

Q. What happened to the wheel on the hand-brake while you were holding the wheel?

A. That kicked back.

Q. What do you mean by that?

A. I was putting it on this way (indicating), and it kicked right back off.

Q. Could you hold it?

A. No, I couldn't.

Q. Was it pulled all the way on?

A. Oh, no.

Q. What happened to you?

A. Down I went.

Q. Why did you swing the lantern?

A. To stop—I didn't know whether they were moving on ——

Q. Anyway, whatever that move was that caused the jar, you tried to stop it?

A. That is right."

In addition, the extraordinary amount of spring was further indicated by the fact that the plaintiff suffered a severe sprain in the fourth and fifth fingers of the left hand. As late as five months after the accident, these fingers were still numb and had developed an ulnar palsy. This showed that the force with which the wheel released itself was so great that it virtually destroyed the nerves in both fingers when the petitioner tried to hold the wheel as it began to swing free.

The fact that the fingers were so hurt proved conclusively that the petitioner must have had his left hand *on the wheel* (the hand from which the lantern was suspended) when it kicked back after having been put on. In any event, it supports an inference that there was a bi-manual operation of the wheel at the time it kicked. At least, therefrom the jury could so conclude.

Furthermore, the nature of the other injury, to wit: the bad sprain in the lower back was consonant with this type of brake reaction. The history that the petitioner gave upon admission to St. Joseph's Hospital attributed the back injury to the sudden kick of the brake (116a).

Dr. Lefkoe had there attributed the back injury to the kick of the brake:

> "Q. What would be the cause of the condition that you found when you examined him?
>
> A. The sudden pull, with more or less twisting motion * * *."

But, any doubts on the question as to whether there was evidence to support the jury's findings are dispelled by the affirmative admission of the trial judge himself.

In the opinion granting judgment n. o. v. for the respondent, the District Court stated:

> "From the paucity of proof offered by plaintiff the jury might logically draw the inference that the brake was inefficient and might have just as logically drawn the inference that the brake reacted normally and efficiently under the circumstances. Since the evidence supports equally two inconsistent inferences of fact, it establishes neither. In this situation the jury should not have been permitted to draw conclusions from plaintiff's evidence regarding the inefficiency of the brake since their conclusion of necessity would have to be based on conjecture and speculation."

In effect, the learned judge conceded that there was evidence supporting the plaintiff's contentions, but he, nevertheless, concluded to grant the judgment N. O. V. only after a careful search of the record to find evidence sustaining contrary inferences in favor of the defendant. *This action of the Court below was, we submit, condemned by LAVENDER v. KURN, supra.*

There an action was brought under the Federal Employers' Liability Act for the death of an employee. There were no eye witnesses to the fatal blow which resulted in death, and it was controverted whether the death resulted through the felonious act of unknown third persons or whether it resulted from circumstances surrounding the decedent's employment from which negligence could be inferred. Concededly, the inferences of negligence practically necessitated the application of conjectural inference. The Supreme Court of Illinois declined to accept the jury's finding of negligence. The United States Supreme Court, on certiorari, emphatically reversed. Its opinion, in part, stated as follows:

> "The evidence we have already detailed demonstrates that there was evidence from which it *might* be inferred that the end of the mail hook struck Haney in the back of the head, an inference that the Supreme Court admitted could be drawn * * *.
>
> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney. And there are facts from which it might reasonably be inferred that Haney was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historical function for an appellate court to weigh the conflicting evidence, judge the

credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury. See Tiller v. Atlantic Coast Line R. Co,, 318 U. S. 54, 67, 68, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. R. 967; Bailey v. Central Vermont R. R. Co., 319 U. S. 350, 353, 354, 63 S. Ct. 1062, 1064, 87 L. Ed. 1444; Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, 35, 64 S. Ct. 409, 412, 88 L. Ed. 520. See also Moore, 'Recent Trends in Judicial Interpretation in Railroad Cases Under the Federal Employers' Liability Act,' 29 Marquette L. Rev. 73.

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." (Italics ours.)

It is submitted that under the LAVENDER case, supra, the United States Supreme Court has repudiated all earlier decisions, including P. R. R. v. CHAMBERLAIN, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 319, basically relied upon below, and that, therefore, in the light of the lower court's admission that there was evidence supporting the plaintiff's contention, the jury's verdict should not have been disturbed. That the LAVENDER case has already had widespread recognition and influence might be readily observed by

reading the opinion of Judge Major in GRISWOLD v. GARDNER, 155 F. 2d 333 (May 15, 1946) (7th Cir.), where we find the following language:

> "Any detailed review of the evidence in a case of this character for the purpose of determining the propriety of the trial court's refusal to direct a verdict would be an idle and useless ceremony in the light of the recent decisions of the Supreme Court. *This is so regardless of what we might think of the sufficiency of the evidence in this respect.* The fact is, so we think, that the Supreme Court has in effect converted this negligence statute into a compensation law thereby making, for all practical purposes, a railroad an insurer of its employees * * *.
>
> "The case of Lavender v. Kurn, supra, the latest decision of the Supreme Court under the Federal Employers Liability Act, leaves little room for doubt but that a directed verdict by a trial court or a holding by any court sustaining a directed verdict will not meet with favor, even though the verdict involves speculation and conjecture * * *.
>
> "That the Supreme Court treats the question of negligence and proximate cause as a jury question in this class of cases is clearly shown by a study of these cases. *Moreover, not only are these issues to be decided by the jury but its decision is unassailable. In fact, it is difficult to conceive of a case brought under this Act where a trial court would be justified in directing a verdict.*" (Italics ours.)

CONCLUSION.

It is respectfully urged that it would be arbitrary to restrict the views and principles announced by this Honorable Court in LAVENDER v. KURN solely to cases arising under the Federal Employers' Liability Act, and that the same

principles should be reiterated as applicable to cases arising under the Safety Appliance Statute, which is essentially pari materia.

Therefore, the original verdict of the jury should be ordered reinstated.

Respectfully submitted,

JOHN H. HOFFMAN,
B. NATHANIEL RICHTER,
RICHTER, LORD & FARAGE,
Counsel for Petitioner.

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ADDENDUM TO ARGUMENT.

Evidence has been outlined, on pages 6-8 of this Brief, which supports the jury's finding that the brake in question was inefficient. In that connection, attention is respectfully directed to the additional significant circumstance, noted in the Statement of Facts, that before plaintiff attempted to set this brake, another employee, Hinkle, had been directed to set all the brakes (on seven cars), including that on the car in question. The uncontroverted testimony shows that Hinkle succeeded in setting the brakes on all the cars, except the one in question (19a).

Why, of all the brakes which Hinkle was ordered to set, and all of which he purported to set, was this one the sole exception? It is submitted that Hinkle's failure to set the brake on this one car alone is material evidence from which the jury could reasonably infer

(a) either that the brake on this particular car had been set by Hinkle, but because of a defect, had subsequently released itself or

(b) that Hinkle had tried to set the brake, but found it too stiff and tense and therefore abandoned the task entirely.

In either event, the jury was justified in inferring negligence.